

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 21, 2004 Session

JEFFREY MARION REED v. GREENE COUNTY, TENNESSEE

Appeal from the Circuit Court for Greene County
No. 01CV413 Ben K. Wexler, Judge

No. E2004-00090-COA-R3-CV - FILED JANUARY 19, 2005

Jeffrey Marion Reed (“Plaintiff”) sued Greene County (the “County”) for damages following a truck accident. Plaintiff was driving a milk truck on a County road and moved to the far right of the road to allow an oncoming vehicle to pass. Plaintiff claims the edge of the road broke away causing the milk truck to tumble down an embankment. Plaintiff filed suit pursuant to the Tennessee Governmental Tort Liability Act (“GTLA”) claiming the County failed to properly maintain and inspect the road resulting in the road being dangerous and unsafe. After a trial, the Trial Court entered a judgment for the County after concluding Plaintiff was solely at fault for the accident, that the road was not dangerous or unsafe and, even if it was, the County did not have actual or constructive notice of the allegedly unsafe or dangerous condition. Plaintiff appeals, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Thomas C. Jessee, Johnson City, Tennessee, for the Appellant Jeffrey Marion Reed.

Roger A. Woolsey, Greeneville, Tennessee, for the Appellee Greene County, Tennessee.

OPINION

Background

This lawsuit involves Plaintiff's claim against the County for property damage resulting from a truck accident. According to the complaint, Plaintiff was driving a milk truck on Birdwell Mill Road in Greene County. Plaintiff claims in the complaint that he stopped the truck in order to allow an oncoming car to pass, at which time "suddenly and without warning the asphalt highway broke causing his vehicle to tumble over the guardrail and into the adjoining field." According to the complaint:

The plaintiff avers that the defendant was negligent in failing to properly maintain and inspect the highways which they are required by law to maintain. The plaintiff further avers that the defendant had knowledge of the defects in the highways. Given the high weeds and condition of the highway upon inspection, it would be clear that the defendant was aware of the circumstances relating to the highway.

Plaintiff filed this lawsuit pursuant to the GTLA and, in particular, Tenn. Code Ann. § 29-20-103 which provides, in relevant part, as follows:

Removal of immunity for injury from unsafe streets and highways – Notice required. – (a) Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. "Street" or "highway" includes traffic control devices thereon.

(b) This section shall not apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved

Although Plaintiff sought damages for personal injury and property damage in the complaint, the personal injury claim was not pursued at trial. Plaintiff sought damages totaling \$46,029.97, which can be broken down as follows: \$40,000 for damage to the milk truck; a wrecker bill of \$1,050 for having the truck towed; \$1,000 in lost income from loss of use of the truck; and \$3,979.87 for the cost of the lost milk that was being transported in the truck.

Defendant denied any liability to Plaintiff, essentially claiming that the road was not in a defective, unsafe or dangerous condition and, even if it was, that the County had no actual or constructive notice of such condition. The parties do not dispute that this lawsuit is governed by the GTLA or that the County was responsible for maintaining the road in question.

At trial, Plaintiff testified that he is self-employed and operates a business which transports milk. Plaintiff drives a milk truck to various producers where he loads the milk into his truck. He then delivers the milk to a processing plant in Asheville, North Carolina. On the night of the accident, Plaintiff had just turned onto Birdwell Mill Road and was traveling 10 to 15 miles per hour when he noticed an oncoming vehicle. Due to the size of the milk truck, which at that time contained approximately 30,000 pounds of milk, Plaintiff moved the truck as far as he could to the right so the oncoming vehicle could pass. Plaintiff was traveling about 20 miles per hour when he felt the “right front of the truck give a little bit.” Plaintiff then described the following events:

I was going to turn it back, but if I had I would have hit the car. So as soon as the car passed the truck, when I went to turn the wheel back, the right front dropped down and the truck wouldn't pull itself back up on the road and when I stopped the truck it tumbled over [the guardrail].

According to Plaintiff, the road was wide enough for the two vehicles to pass each other and his truck was completely on the pavement when he first felt the road giving way. Plaintiff returned to the accident scene the next morning and noticed “a lot of growth, weeds and underbrush.” Plaintiff stated that some of the weeds were growing through the pavement which had broken away, although there were no weeds growing through the pavement in any other place. When he returned to the accident scene, Plaintiff also noticed “up under the bank of the roadway there was a hole that had fell out underneath the blacktop.”

Plaintiff employed two part-time truck drivers who assisted him from time to time. Plaintiff has three different routes that he drives, two during the day and one at night. Each route is driven every other day. Plaintiff was driving the night route when the accident happened. Plaintiff has been driving the milk truck on Birdwell Mill Road for 1½ to 2 years, and he has never noticed any problems with the road. Plaintiff also stated he had no concerns about the roadway prior to the accident. Other than Plaintiff, there were no witnesses to the accident. The occupants in the oncoming vehicle did not stop after passing the truck.

Anthony Neil Campbell (“Campbell”) is employed at DTR of Tennessee and also occasionally worked for Plaintiff driving a milk truck. Most of Campbell's testimony centered around the specifics of the routes he drove for Plaintiff and, in particular, the fact that he and Plaintiff had split the night route on the night of the accident. Campbell also testified that he would have notified somebody if he had noticed any problems with Birdwell Mill Road. Campbell never had any problems when driving the milk truck on Birdwell Mill Road.

The County called John William Heid as an expert witness. Heid is the owner of Accident Reconstruction and Traffic Engineering Consultants. In 1974, Heid earned a bachelor's degree in civil engineering and specialized in transportation engineering. Heid earned a master's degree in 1977, again specializing in transportation engineering. Heid is certified by the Accreditation Commission of Traffic Accident Reconstructionists. The Trial Court accepted Heid

as an expert witness in accident reconstruction. Plaintiff's counsel informed the Trial Court that there was no objection to Heid being designated as an expert witness.

Heid testified that he reviewed the pleadings, depositions, the wrecked truck, and various pictures of the accident scene prior to rendering an opinion. With regard to the accident in question, Heid testified that the truck came into contact with the guardrail while the truck still was on the asphalt. The truck then rode along the guardrail for several feet. According to Heid, the entire right front tire of the truck completely "left the roadway" before it got to the section of the pavement that broke away. Heid then explained that as the truck was going over the bank, the front axle and steering portion of the truck came down on the edge of the asphalt causing the edge of the road to break off. Heid added:

[The road] is not designed to be sustaining that type of a weight, and that's what really caused the asphalt itself to break away and not ... a situation that the road itself was bad. It's just that it may or may not have been structurally up to par, but for this particular accident, that's not the cause of it breaking off. The cause of it breaking off is the milk truck's axle coming down on the roadway surface itself and being dragged along that section, and that weight and that force is what broke that asphalt off.

Heid concluded that the cause of the accident was Plaintiff's failure to maintain control of his vehicle by pulling too far to the right causing the right front wheel of the truck to completely leave the roadway. Instead of stopping once this happened, Plaintiff kept going and the rear tires then left the roadway causing the truck to "capsize." Heid concluded by stating that neither the guardrail installation nor the roadway itself contributed to the accident. Heid's testimony concerned only causation and did not address the notice issue.

The County's representative at trial was J.C. Jones ("Jones"), the Greene County Highway Superintendent. Jones testified that the County has not received any complaints about Birdwell Mill Road in the area where the accident occurred.¹

The Trial Court concluded that Plaintiff failed to prove the area of Birdwell Mill Road where the accident happened was either defective, unsafe, or dangerous. The Trial Court added:

[N]or did [Plaintiff] show or furnish any evidence of any previous accidents at the place where this accident occurred, nor did he have any evidence from an expert witness showing that the condition of the road was the cause of this accident, nor did he show that Greene

¹ The County did receive complaints about a one-lane bridge not far from the accident site. This bridge, however, was completely replaced before the accident occurred.

County Highway Department had any constructive or actual notice that [the road] was defective, unsafe, or dangerous.

The Trial Court also found that the cause of the accident was Plaintiff's steering the truck too far to the right, causing the right front wheel to completely leave the road and the truck's axle to break the asphalt as the truck continued to go to the right until it eventually went over the embankment. Based on these findings, the Trial Court concluded the accident was caused by Plaintiff's negligence and, finding no basis in which to hold the County liable, the Trial Court dismissed the complaint.

Plaintiff appeals raising several issues. Plaintiff notes that the officer who investigated the accident was not called by the County as a witness at trial. Plaintiff did not subpoena this officer. Plaintiff claims the officer was under the unique control of the County and its failure to call the officer should be held against it and the Trial Court should have presumed the officer would have testified adversely to the County. Plaintiff also claims the Trial Court erred in allowing Heid to testify when his opinions were not supported by the evidence and because Heid relied on photographs which did not accurately depict the accident scene. Finally, Plaintiff claims the preponderance of the evidence weighs against the factual findings and resulting decision of the Trial Court.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We begin by addressing whether the Trial Court erred when it found Plaintiff failed to prove the County had actual or constructive knowledge of any defective, unsafe, or dangerous condition of the road. The issue of whether the County had actual or constructive notice is a question of fact. *See Pool v. State*, 987 S.W.2d 566, 568-69 (Tenn. Ct. App. 1999) ("[T]he pivotal issue is whether the proper state officials had notice of the dangerous condition ... in enough time to take protective measures.... This is a factual issue."); *James v. Metro. Gov't of Nashville and Davidson County*, 55 Tenn. App. 622, 628-29, 404 S.W.2d 249, 252 (1966) ([W]hether a municipality has had actual notice of the defective condition ... or whether the condition had existed for a sufficient period of time for the municipality to be advised of its existence by the exercise of ordinary care, present questions of fact").

Plaintiff does not claim the County had actual notice of the alleged defective, unsafe, or dangerous condition of the road. Rather, Plaintiff claims the County had constructive notice that the road was dangerous, unsafe, or defective because of the weeds growing through the asphalt and

because of the hole he noticed in the ground located on the side of the embankment where the accident occurred. What we must decide is whether the existence of the weeds and the hole are sufficient for us to conclude that the preponderance of the evidence weighs against the Trial Court's findings that the County did not have constructive notice of the alleged defective, dangerous, or unsafe condition. In other words, does Plaintiff's proof overcome the other proof in the record which supports the County's position that it did not have constructive notice. The evidence which supports the County's position on the notice issue includes, among other evidence, the testimony of both Plaintiff and Campbell that they drove on Birdwell Mill Road in the past and never noticed any problems with the road and never actually experienced any problems with this road, as well as the testimony of Jones that the County never has received any complaints about the condition of the road where the accident occurred. Our thorough review of the record shows that other than evidence of the weeds and perhaps the hole in the side of the embankment, Plaintiff presented no proof showing either actual or constructive notice by the County of the alleged dangerous, unsafe, or defective condition. As discussed, proof was presented that the County had no such notice.

Whether the County had constructive notice of the claimed defects in the road is a factual issue. The presence of the weeds in the asphalt and the hole in the side of the embankment certainly are insufficient for us to conclude as a matter of law that the County had constructive notice. Even assuming for present purposes only that the presence of the weeds and hole are sufficient to create a factual issue, we nevertheless are unable to conclude that this proof is such that the preponderance of the evidence weighs against the Trial Court's finding. The evidence contained in the record before us does not preponderate against the Trial Court's finding that the County had neither actual nor constructive notice of the alleged dangerous, defective, or unsafe condition. As the evidence contained in the record before us does not preponderate against the Trial Court's finding that the County had neither actual or constructive notice, we will not overturn that factual finding.

Because we affirm the Trial Court's findings and resulting conclusion on the issue of notice, Plaintiff's claim under the GTLA must fail, and we need not decide whether the road actually was dangerous, unsafe or defective. In addition, this holding necessarily pretermits Plaintiff's remaining issues as well.

Conclusion

The Judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are assessed against the Appellant, Jeffrey Marion Reed, and his surety.

D. MICHAEL SWINEY, JUDGE